UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

BNSF RAILWAY CO.,

Defendant.

CASE NO. 2:14-CV-01488-MJP

ORDER DENYING DEFENDANT'S RENEWED MOTION TO DISMISS

THIS MATTER comes before the Court on Defendant BNSF Railway Co.'s Renewed Motion to Dismiss Plaintiff Equal Employment Opportunity Commission's claim under the Americans with Disabilities Act filed on behalf of Russell Holt. Having considered the motion (Dkt. No. 21), the response (Dkt. No. 23), the reply (Dkt. No. 24), and all attached documents, the Court DENIES Defendant's Renewed Motion to Dismiss.

Background

BNSF Railway Co. ("BNSF") offered Russell Holt ("Holt") a position as a patrol officer, contingent upon Holt passing a post-offer, pre-employment medical examination. (Dkt. No. 23

at 5.) The Equal Employment Opportunity Commission ("EEOC") alleges that BNSF discriminated against Holt when, after BNSF's contract doctor cleared Holt for the position based on a routine medical examination required of all applicants, it demanded that Holt procure a follow-up MRI. (Id. at 5.) Because the MRI was deemed not medically necessary by Holt's doctor, Holt's medical insurance would not cover it; Holt would have to pay for the MRI himself. (Id. at 5.) When Holt refused to procure the MRI because of the cost, BNSF refused to waive the requirement, and rescinded the offer of employment. (Id. at 5.)

EEOC contends the MRI was an improper additional inquiry not required of all entering employees, and discriminated on the basis of disability in a manner that was not job-related and not consistent with business necessity, violating sections 42 U.S.C. § 12112(d)(3)(A) and (C) of the Americans with Disabilities Act ("ADA"). (Dkt. Nos. 11, 23.) Defendant argues that the ADA allows BNSF to require the MRI because it was a follow-up examination that is medically related to the initial examination. Defendant now moves to dismiss Plaintiff's ADA claim.

Analysis

I. Legal Standards

A. Motion to Dismiss

To survive a Fed. R. Civ. P. 12(b)(6) motion, a complaint must state a claim for relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Plausibility does not mean probability, "but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. Merely reciting the elements of a cause of action will not suffice. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

Courts follow a two-pronged approach when deciding whether a complaint survives a Fed. R. Civ. P. 12(b)(6) motion. Iqbal, 556 U.S. at 678-79. First, "a court must accept as true all of the allegations contained in a complaint" unless the allegations are legal conclusions. Id. Second, the claim for relief must be plausible, which is a context-specific task. Id. Courts can consider "documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice" when making their determination. U.S. v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

B. Discrimination in the Hiring Process Under the ADA

No covered employer shall discriminate against a qualified individual on the basis of disability in the hiring process. 42 U.S.C. § 12112(a). After an offer of employment but before the start of work, the employer may require a medical examination and may condition the offer of employment on the results of such examination. 42 U.S.C. § 12112(d)(3). These examinations are not required to be job-related and consistent with business necessity, 29 C.F.R. § 1630.14(b)(3), but if the results of the examination screen out or tend to screen out individuals with disabilities, the screening criteria must be job-related and consistent with business necessity. 42 U.S.C § 12112(b)(6).

The examination is subject to three restrictions: all entering employees must receive an examination regardless of disability, information obtained from the examination must be kept sufficiently confidential, and the results of the examination must only be used "in accordance with this subchapter," i.e., they must not be used to impermissibly discriminate against a candidate with disabilities. 42 U.S.C. § 12112(d)(3)(A)-(C).

EEOC guidance provides that, after the examination, an employer may request more medical information from an entering employee if the follow-up examinations or questions are "medically related to the previously obtained medical information." EEOC, EEOC Notice No. 915.002, Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (1995); see also, McDonald v. Webasto Roof Sys., Inc., 570 F. App'x 474, 476 (6th Cir. 2014); Flores v. Am. Airlines, Inc., 184 F. Supp. 2d 1287, 1294 (S.D. Fla. 2002). An employer may choose to ask only some individuals for follow-up examinations before clearing them for work; they need not ask all applicants. See McDonald, 570 F. App'x at 476.

II. Claim against BNSF under the ADA

EEOC argues that BNSF impermissibly discriminated against a qualified individual on the basis of disability by requiring Holt to secure an MRI at his own expense after being cleared by a company doctor. While all applicants were given medical examinations, not all applicants were required to secure expensive additional examinations at their own expense. (Dkt. No. 23 at 6.) EEOC argues that just because follow-up examinations, such as the MRI here, are permissible if medically related to initial examinations given to all applicants, it does not necessarily follow that covered employers can require applicants to bear the costs of those follow-up procedures. (Dkt. No. 23 at 12.) EEOC argues the MRI requirement, because of its cost, functioned as a screening criterion which screened out Holt, and that screening out Holt in this manner was impermissible because the criterion is not job-related or consistent with business necessity. The criterion also tends to screen out people with disabilities by requiring them to secure expensive additional examinations that applicants without disabilities are not required to secure. (Dkt. No. 23 at 12.)

BNSF argues that examinations seeking additional information based on the results of the first examination, such as the MRI required here, are considered part of post-offer, pre-employment medical examinations and are permitted by EEOC guidance as long as they are medically related. (Dkt. No. 24 at 4-5.) Defendant contends that post-offer, pre-employment examinations are not required to be identical for all applicants under either the ADA or EEOC guidance. (Dkt. No. 21 at 8-9.) Defendant further argues that because Holt did not procure the MRI, BNSF did not use the MRI or its results to disqualify him from the position; rather, BNSF used Holt's failure to submit a complete application to disqualify him. (Dkt. No. 21 at 8.)

The Court is not persuaded by Defendant's contentions. The statute does not authorize an employer to require that an entering employee pay for the follow-up examination where only applicants with disabilities are asked to provide the follow-ups, especially where a company doctor has already cleared that employee as fit for the position. Defendant is correct that a post-offer, pre-employment examination need not be job-related and consistent with business necessity, and that medically-related follow-up examinations of some entering employees are permitted. But BNSF's requirement that Holt procure a follow-up MRI after the post-offer, pre-employment examination functioned as a screening criterion that screened out an applicant with a disability by imposing an expensive additional requirement not imposed on other applicants. The ADA requires screening criteria that screen out people with disabilities to be job-related and consistent with business necessity; here, EEOC argues the MRI requirement was not job-related and consistent with business necessity. A company doctor had already cleared Holt for work, and at the time of his application, Holt had been performing patrolman duties as a police officer for eleven years without any accommodation.

As BNSF points out, the ADA does not discuss the cost or payment of ADA-permitted medical examinations. BNSF cites to several cases in support of its interpretation of the statute, but in none of the cases relied on did the employer require the applicant to pay for a follow-up examination or require a follow-up after its contract doctor had already cleared the applicant for work. EEOC has stated a plausible claim upon which relief can be granted.

Conclusion

The Court finds that Plaintiff has stated a claim under the Americans with Disabilities Act. Defendant's Renewed Motion to Dismiss is DENIED.

The clerk is ordered to provide copies of this order to all counsel.

Dated January 29, 2015.

Marsha J. Pechman
Chief United States District Judge